The Posse Comitatus Act and Disaster Response

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CHAPTER 3

The Posse Comitatus Act and Disaster Response

Michael Greenberger and Arianne Spaccarelli
The Posse Comitatus Act does not restrict the use of military forces in disasters, except when it comes to law enforcement missions. The president can authorize military troops for law enforcement should catastrophic events prevent states from protecting constitutional rights or properly executing U.S. law.
The images of a major American city descending into lawlessness and chaos more characteristic of a war-torn third-world country has become burned into the American consciousness in the wake of Hurricane Katrina. Even five years later, we continue to debate what went wrong, who was to blame, and how to prevent such a tragedy from recurring. The delayed federal response, in particular the failure to quickly send active duty troops and other military assets to Louisiana, has been central to much of the criticism of the response effort. Although bureaucratic and operational ineptitude at the state and federal level certainly bear their share of the blame for this delay, the primary cause was President George W. Bush’s perceived lack of statutory or constitutional authority to assume command of response efforts by the National Guard or to override Louisiana Governor Kathleen Babineaux Blanco’s refusal to allow a unified command structure for active duty federal forces and the National Guard forces under an Army general.\(^1\)

This perception arose from a narrow interpretation of both the Posse Comitatus Act,\(^2\) which bars the use of federal troops for domestic law enforcement\(^3\) under most circumstances, and constitutional principles of federalism and limited government authority. The disastrous consequences of such an interpretation drove Congress to enact the Warner Amendment (subsequently repealed) to the Insurrection Act, which granted the president explicit authority to deploy federal troops without the consent of the affected state to respond to natural disasters and other major domestic emergencies.\(^4\) Indeed, even before Hurricane Katrina, experts recognized the need for greater military assistance during disaster response efforts. On October 1, 2002, the president established the U.S. Northern Command “to provide command and control of Department of Defense homeland defense efforts and to coordinate defense support of civil authorities.”\(^5\) Despite the ongoing controversy about the role of the military in domestic disaster response that led to the repeal of the Warner Amendment,\(^6\) diverse leaders and experts have continued to emphasize the military’s critical and indispensable role in responding to catastrophic events.\(^7\) The Department of Defense itself has acted to enhance the military’s response capabilities, assigning an active duty unit as an on-call federal response force for domestic disasters for the first time in the nation’s history.\(^8\)

Despite the controversy and confusion about the Posse Comitatus Act’s restriction on the use of military forces domestically, the Warner Amendment was not necessary to provide the federal government sufficient authority to unilaterally respond to a natural disaster such as Hurricane Katrina. As is shown in this chapter, the complete breakdown of law and order during a catastrophic emergency was and is sufficient to authorize the president to unilaterally deploy federal troops under the Posse Comitatus Act and the Constitution.
OVERVIEW OF THE POSSE COMITATUS ACT

The Posse Comitatus Act (PCA) prohibits the use of federal troops for law enforcement purposes “except in cases and under circumstances expressly authorized by Congress.” The PCA has been in force since 1878, when it was enacted as part of a backlash against the imposition of federal martial law in the former Confederate states during Reconstruction. Congress was concerned that the deployment of the military in the South was being used more as a political weapon than as a means of defending the country and maintaining order. As the statutory language shows, however, Congress also recognized that there would be times when domestic military deployment would be necessary and constitutionally permissible.

The PCA applies directly only to active duty federal troops in the Army and Air Force. However, the Department of Defense issued a directive making its restriction on domestic law enforcement activities applicable to the Navy and Marine Corps. The Coast Guard, which is under the control of the Department of Homeland Security and not the Department of Defense, is not covered by the PCA.

The status of the National Guard is more complicated because National Guard personnel are simultaneously members of their state militias and the federal Army...
reserve. When a National Guard unit is under the command of its state’s governor, the PCA does not apply to its actions and it may perform civilian law enforcement functions to the extent permitted by its state’s laws. However, when the Guard is called into federal service by the president, it is part of the active federal military.

Active federal military forces may, without constraint by the PCA, perform a variety of disaster assistance tasks, including delivering supplies and conducting search and rescue operations. They may also assist civilian law enforcement agencies by, for example, providing training or equipment. After Hurricane Katrina, the Department of Defense provided active duty federal forces for these purposes, but their deployment to Louisiana was delayed, both because of bureaucratic roadblocks and because of the aforementioned concerns and conflicts about federal command of the overall response effort by federal troops and National Guard forces under state command. The Bush administration attempted to prevent the latter problem by either having the federal military assume command of all Department of Defense and National Guard personnel or having General Russel Honoré, the commander of the Department’s Joint Task Force Katrina, assume command of the unified forces after being sworn in as a member of the Louisiana National Guard. Governor Blanco rejected both proposals. Federal troops may not, however, participate directly in law enforcement operations, such as riot control or search and seizures, unless authorized by a statutory or constitutional exception to the PCA.

**STATUTORY EXCEPTIONS TO THE POSSE COMITATUS ACT**

There are numerous statutory exceptions to the PCA. Some, like Section 1416(a) of the National Defense Authorization Act for Fiscal Year 1997, are narrowly drawn to address specific types of crises; others, like the Insurrection Act, grant broader authority for the federal military to intervene during times of domestic turmoil. Despite the concerns that hindered federal response efforts during Hurricane Katrina, the federal government recognized in the December 2004 National Response Plan (NRP) that the statutory and constitutional exceptions provided adequate authority for a unilateral deployment of federal troops during a disaster of national consequence that overwhelmed state and local response capabilities. Nevertheless, this official recognition in the NRP was undermined by widespread uncertainty about the PCA. Some of this arises because of lay observers’ focus on the general prohibition on the use of the military without investigating possible exceptions. Some of it arises from confusion about when and to what extent certain exceptions apply.

The two principal statutory exceptions that apply across a broad range of catastrophes are the Insurrection Act and the Robert T. Stafford Disaster Relief and
Emergency Assistance Act (the Stafford Act). These statutes are discussed in detail below. In addition, there are numerous other statutes providing exceptions for certain activities or under certain circumstances, ranging from a statute exempting the Department of Defense’s Inspector General from the PCA to the Comprehensive Environmental Response, Compensation, and Liability Act. The principal exceptions are discussed briefly in the following sections.

Insurrection Act

Almost continuously since 1792, the president has possessed the statutory authority to deploy military personnel to suppress insurrections and rebellions. The current Insurrection Act was enacted in 1807 and has remained in effect, with very little alteration, for over 200 years. In its current form, the Insurrection Act permits the deployment of federal military forces to suppress insurrections and domestic violence and to enforce federal law in three circumstances:

- The first provision of the Act permits federal military intervention to suppress an insurrection in a state upon the request of that state’s governor or legislature. President George H. W. Bush used his authority under this provision to deploy troops to suppress domestic violence during the 1992 Los Angeles riots at the request of the California governor.

- The second provision of the Act permits the president, on his or her own initiative, to suppress rebellion or enforce federal laws if he or she believes that “unlawful obstructions, combinations, assemblages, or rebellion against the authority of the United States make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings.” This language reflects the earliest version of the Insurrection Act, the Militia Act of 1792, which was used by President George Washington to suppress the Whiskey Rebellion in 1795, despite the reluctance of Pennsylvania’s governor.

- Finally, the Act permits the president “to take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.”
section explicitly permits the president to act when a state’s actions or inactions deprive its citizens of equal protection of the law, reflecting its origins in the post–Civil War period. This provision authorized President Dwight Eisenhower’s deployment of federal troops to enforce a desegregation order in Little Rock, Arkansas, in 1957.

The third provision of the Act is of particular interest in the context of a catastrophe such as Hurricane Katrina, during which a state is unable to provide the basic guarantees of government and public safety to a large number of its residents. In addition to the widespread looting and privations experienced by ordinary citizens left behind in New Orleans, the legal system in the city and state was so devastated by the shortage of police, prison guards, attorneys, and resources that thousands of individuals detained in its jails were deprived of even the basics of constitutional criminal process. Such a governmental collapse arguably deprives citizens of their constitutional right to equal protection of the laws and, if so, justifies unilateral federal intervention under the Insurrection Act.
Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974

The Stafford Act is the principal authority for providing disaster assistance and relief to the states and territories. It authorizes the federal government to provide a wide range of assistance to states, local governments, and individuals in response to major emergencies. In order to trigger assistance under the Act, the president must declare a disaster or state of emergency. Qualifying events under the Act include natural disaster and other catastrophes that require assistance to “save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.”

Usually, a presidential declaration must be made at the request of a state’s governor, but the president may make an emergency declaration (but not a major disaster declaration) unilaterally if “the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.” When a declaration under the Act is issued at the request of a governor, the governor is responsible for describing the nature and scope of the emergency and for specifying the type of assistance his or her state requires.

The Act authorizes federal agencies to provide a wide range of assistance to address immediate threats to life and property, including using, lending, or donating federal equipment, supplies, facilities, personnel, and other resources, and by providing medicine, food, and other consumables through state and local governments or designated relief agencies. In order to save lives or protect property, federal agencies may also perform services on private or public property to remove debris; perform search and rescue; provide emergency medical care; provide food, water, medicine, and other essential supplies; clear roads; and generally reduce “immediate threats to public health and safety.” If requested by the affected state’s governor, the president may deploy Department of Defense resources and personnel to assist in response and recovery efforts.

Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) gives the president and the Environmental Protection Agency broad authority to respond to the release or threatened release of hazardous substances, pollutants, or contaminants that imminently endanger public health or welfare. The National Contingency Plan promulgated pursuant to this statute calls for the Department of Defense to use its resources in responding to releases and threatened releases.
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covered by the statute.\textsuperscript{45} This authorization constitutes an exception to the PCA and does not require the request or permission of the affected state’s governor.

CERCLA defines pollutants and contaminants broadly, to include, but not be limited to, “any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions, . . . or physical deformations.”\textsuperscript{46} This definition clearly encompasses many substances that could be released in a chemical, biological, or radiological event or as a result of a natural disaster.

Once a release of contaminants or pollutants has occurred, the president may act to remove and remediate the effects of the substance, including taking security measures to limit access to the site, temporarily or permanently relocating individuals threatened by the release, and providing any emergency assistance that may otherwise be provided under the Stafford Act.\textsuperscript{47} The president may also, after giving notice to the affected state, issue “such orders as may be necessary to protect public health and welfare and the environment.”\textsuperscript{48} As reflected in the National Contingency Plan,\textsuperscript{49} these broad authorities have been interpreted to authorize the president’s unilateral deployment of active duty military to an affected area for law enforcement purposes in order to allow the federal government to carry out its duties under CERCLA.

Other Statutory Exceptions

Congress has enacted more than 20 other exceptions to the PCA.\textsuperscript{50} In addition to exceptions that are intended to be used for more or less routine policing functions on federally controlled land,\textsuperscript{51} there are several that apply during environmental and public health emergencies. These include the following:

\begin{itemize}
  \item The Secretary of the Navy may assist in federal quarantine and isolation efforts at any port of the United States by providing vessels at the request of the Secretary of Health and Human Services.\textsuperscript{52}
  \item The Attorney General may request the Department of Defense to assist in enforcing laws against criminal transactions in nuclear materials if an emergency situation exists. This can include assisting in arrest and other law enforcement activities.\textsuperscript{53}
  \item The Secretary of Defense may assist the Department of Justice in responding to an emergency involving chemical or biological weapons of mass destruction when it “poses a serious threat to the interests of the United States” and “civilian expertise and capabilities are not readily available” to handle the situation.\textsuperscript{54} This includes personnel, equipment, and supplies to identify, monitor, and dispose of the weapons involved.\textsuperscript{55}
\end{itemize}
such as performing searches and seizures as part of a criminal investigation, may be provided only when it is "considered necessary for the immediate protection of human life and civilian law enforcement officials are not capable of taking the action."56

CONSTITUTIONAL ISSUES RELATED TO THE POSSE COMITATUS ACT AND ITS EXCEPTIONS

A bedrock constitutional assumption underlying federal–state relations is that the federal government may not invade the states’ police powers unless authorized by the Constitution. Even in the absence of the PCA, this limits the power of the federal government to deploy troops for domestic law enforcement purposes to circumstances under which the Constitution empowers the president or Congress to act. Similarly, Congress cannot usurp the president’s constitutional authority to deploy troops domestically merely by enacting the PCA.

The PCA therefore presents two constitutional questions. First, what is the constitutional authority for statutory exceptions to the PCA? The answer is found in five principal constitutional provisions: the Insurrection, Guarantee, Commerce, Necessary and Proper, and Spending Clauses.

Second, what, if any, constitutional exceptions exist to the PCA’s ban on the use of military for domestic law enforcement purposes? Although the text of the PCA contemplates constitutional exceptions, the question defies easy answers. Not only is the case law scant and the scholarship conflicted, but the drafters of the legislation themselves disagreed on whether such exceptions existed.57 Nevertheless, the Guarantee Clause appears to provide a solid basis for unilateral presidential action in this area.

This section discusses the constitutional parameters of the use of federal military forces for domestic law enforcement, including uses authorized by Congress and undertaken under the president’s own authority.

Insurrection Clause

The years immediately following the end of the Revolutionary War were marked by civil turmoil and unrest, giving the Founders good cause for anxiety about the democratic stability of both the state and federal governments. This anxiety was inspired not only by external threats but by internal dissension within states and between citizens and the federal government. In particular, the 1787 Shays’ Rebellion, a farmer’s insurrection against taxes in Massachusetts, exposed the fragility of the new nation. Massachusetts suppressed the rebellion after the rebels seized a federal arsenal, but the
state had found itself unable to rely on either a national government or its fellow states for support. Shays’ Rebellion inspired not only the earliest version of the Insurrection Act, but influenced the drafters of the Constitution to include the Insurrection and Guarantee Clauses to authorize the federal government to suppress rebellions on its own initiative and guarantee states and their citizens support in maintaining stable governments.

The Insurrection Clause empowers Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” The Insurrection Clause, along with the Guarantee Clause, provides the primary authority for the Insurrection Act. As discussed previously, various versions of the Insurrection Act have been used to suppress riots and rebellions since 1792. Although Congress has opted to require a state’s permission to deploy troops under many circumstances, the Insurrection Clause does not require such circumspection. The Clause provides ample authority for Congress to authorize unilateral deployment of federal troops during insurrections and civil unrest so severe as to cause a complete breakdown of law and order in the affected area.
Guarantee Clause

The Guarantee Clause has its roots in the same tumultuous period as the Insurrection Clause. The Guarantee Clause provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” Unlike the Insurrection Clause, the Guarantee Clause imposes an affirmative duty on all branches of the federal government to act to secure a republican form of government in each state. Neither the duty nor the power it creates is confined to a particular branch of government, indicating that it confers authority on both Congress and the president.

The scope of the Guarantee Clause authority has not been tested. However, it is noteworthy that President Abraham Lincoln based his authority for taking military action against the South during the Civil War on the Guarantee Clause rather than on his war powers. In addition to any authority granted by statutes like the Insurrection Act, the collapse of a functioning government during a catastrophic emergency likely triggers the protections and powers of the Guarantee Clause because such a collapse deprives citizens of the benefits and protection of a republican form of government. The president would not require congressional authorization or the state’s permission to deploy federal troops under these circumstances because he would be fulfilling his constitutional duty to restore a republican form of government to the affected state.

Commerce Clause

The Commerce Clause affords Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.” The Supreme Court has long held that the Commerce Clause permits Congress to “regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce.” Even when intervening in areas not directly tied to commerce, the Commerce Clause, at a minimum, empowers Congress to regulate activities and respond to situations that “substantially affect interstate commerce.”

Catastrophic emergencies, such as Hurricane Katrina or the World Trade Center attacks of September 11, 2001, unquestionably have an enormous impact on interstate commerce. The devastating economic effects of a disaster are rarely confined to the affected state. For example, the 9/11 attacks cost the nation’s businesses billions of dollars and left tens of thousands of workers unemployed. Hurricane Katrina caused $100 billion of property damage in several states, sent thousands of victims across state borders, and seriously disrupted oil production and refining.

Although some scholars have argued that recent Commerce Clause jurisprudence has significantly limited the ability of Congress to legislate in areas, like domestic law enforcement, that fall within the states’ traditional police powers, the direct and severe economic impact of catastrophic emergencies would justify congressional authorization for the unilateral deployment of federal troops even under the more rigorous scrutiny applied to such actions in recent years. Moreover, Gonzales v. Raich.

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shows that the concern about stricter Commerce Clause jurisprudence is overblown. In *Raich*, the Supreme Court ruled that Congress, through the Controlled Substance Act, could regulate entirely intrastate commerce in the growth, distribution, and sale of marijuana for medicinal purposes and preempt state legislation supporting such commerce, because the production in question affected interstate commerce by endangering the nation’s public health. In so ruling, the majority rejected the argument that this exercise of Commerce Clause authority “encroached on the States’ traditional police powers to . . . protect the health, safety, and welfare of their citizens.” *Raich* strongly indicates that even if an emergency’s immediate consequences are confined to a single state, unilateral federal response, including deployment of troops, is a proper exercise of Congress’s authority to regulate interstate commerce.

**Necessary and Proper Clause**

The Necessary and Proper Clause provides Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [in Article I], and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.” The Necessary and Proper Clause is particularly important to regulation of local, noneconomic activities incidental to Congress’s exercise of its Commerce Clause power, but it is also important for the effective exercise of Congress’s powers under the Insurrection and Guarantee Clauses. Although sometimes overlooked, it is important to note that the Necessary and Proper Clause formed part of the basis for the decision in *Raich*. According to Justice Antonin Scalia’s concurrence, while local production, sale, and use of marijuana were not themselves part of interstate commerce, Congress had the power to regulate them because they could undermine the prohibition on interstate commerce in marijuana. The reasoning in both the majority and concurring opinions in *Raich* indicate that the Necessary and Proper Clause is a proper basis to legislate on matters that, while not squarely within a subject matter covered by its other constitutional authorities, are nevertheless necessary to effectively exercise the federal government’s constitutional powers.

**Spending Clause**

The Spending Clause authorizes Congress to tax and spend for the general welfare. Like the Necessary and Proper Clause, the Spending Clause does not provide direct authority for deployment of federal troops for law enforcement purposes in response to a catastrophic event. However, Congress often uses its Spending Clause authority to assert federal control in areas that would otherwise be the sole domain of state governments by requiring states to meet certain standards or take certain actions in order to be eligible for federal aid. While states can challenge such conditions as congressional
overreaching, they are usually upheld under the standard set forth in *South Dakota v. Dole*. If Congress deemed it necessary, it could condition receipt of Stafford Act disaster assistance, for example, on a state’s consent to permit the deployment of federal military in response to catastrophic events where the state is overwhelmed and unable to either provide basic services to its citizens or effectively use federal resources.

Under *South Dakota v. Dole*, conditions placed on congressionally authorized funds are a valid exercise of Congress’s spending power so long as they are stated clearly, serve the general welfare, are reasonably related for the purpose for which federal funds are being allocated, and do not induce states to violate an independent constitutional bar. The condition on Stafford Act funds suggested above would almost certainly comply with this test. Any amendment to the Act could set forth a clear standard for when deployment of troops would be required. As it would be enacted solely for the purpose of protecting the health and safety of citizens impacted by the disaster, it would certainly serve the general welfare. Likewise, the purpose of deploying troops would be the same as the purpose of providing disaster assistance in the first place—saving lives and protecting property during an emergency.

The Tenth Amendment may present an independent constitutional bar, in violation of the fourth prong of the test. Indeed, the Warner Amendment’s supposed violation of the police powers reserved to the states by the Tenth Amendment was part of the argument used by state governors and others who opposed it. Although in most situations, such as the requirement that states raise the minimum drinking age in order to receive federal highway funds, any Tenth Amendment issues are satisfied by the state’s ability to simply refuse funds. However, in *Dole* the Court recognized that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” Nevertheless, many emergency response resources are available for purchase by the states in the private sector. States also have access to mutual aid agreements, such as the Emergency Management Assistance Compact (EMAC), under which 20,000 civilians and 46,500 National Guard personnel, along with substantial material and supplies, were provided to the Gulf Coast region by other states. It is true that EMAC requires an aid-requesting state to reimburse aid-rendering states unless the aid-rendering states waive reimbursement. This makes relying on EMAC in the absence of federal disaster relief funds to cover the costs less attractive and, in some cases, infeasible. Nevertheless, even during emergencies and major disasters, a state is not without alternate options, even if the option of federal aid is the most attractive and convenient.

**CONCLUSION**

The deployment of federal military troops domestically is among the most controversial issues in disaster and emergency response. While the PCA and the Constitution
do place significant restrictions on the domestic use of federal troops for such traditional law enforcement and state functions as riot control, arrest, and interdiction, they are not so restrictive as to tie Congress’s and the president’s hands when faced with a catastrophe that overwhelms an affected state’s ability to provide essential government functions. The Insurrection, Guarantee, and Commerce Clauses directly empower Congress to authorize deployment of federal troops under these circumstances even without a state’s request or permission. And while existing statutory exceptions, particularly the Insurrection Act, provide the president with adequate authority to deploy troops under such circumstances, the Guarantee Clause provides an important constitutional exception to the PCA restrictions. Under the Guarantee Clause, the president probably has the power to unilaterally deploy troops when an event causes so much damage that local and state governments are unable to provide their citizens with the basic rights and protections that must be secured by a republican form of government.

Although existing law provides more than adequate authority for the deployment of federal troops without a state’s consent in situations like that faced by New Orleans after Hurricane Katrina, it may nevertheless be useful to clarify this authority by enacting additional legislation. If Congress is unwilling to make federal authority more explicit through such bald language as in the repealed Warner Amendment, it may choose to do so by using its spending power to condition receipt of federal disaster aid on permitting deployment of federal troops in certain circumstances. This solution would clarify authorities during natural disaster in particular and at least partially assuage the states’ concerns about the usurpation of their authority by the federal government.

NOTES


3. For the purposes of this chapter, “domestic law enforcement” does not refer to any activities undertaken in response to a foreign attack or invasion, which would fall under the rubric of the president’s commander-in-chief powers and the president and Congress’s war powers.


11. *Id.*


15. *Id.* at 7 n.21.


18. See *id.* See also Lipton, supra note 1; Glasser & Grunwald, supra note 1.


25. 5 U.S.C.A. app. 3 § 8(g).


27. In 1792, Congress passed the Militia Act, authorizing deployment of federal troops during invasions by foreign forces or Indian tribes and “whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state, [or] by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.” Ch. 28, §§ 1 & 2, 2d Cong. (May 2, 1792).

28. The most significant amendment to the Insurrection Act was the 2006 Warner Amendment, discussed in supra text accompanying notes 4 and 6. The Warner Amendment explicitly authorized the president to deploy federal troops without a state’s consent in order to

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respond to “a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition.” The Warner Amendment was repealed and the Act’s original language restored by the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1068 (2008).


32. See supra note 27.


34. 10 U.S.C.A. § 333.

35. The statute that was to become 10 U.S.C.A. § 333 was enacted in 1871. 17 Stat. 14.

36. See Lemann, supra note 30, at 68.

37. For a detailed discussion of the fate of thousands of New Orleans prisoners and detainees, many of whom would otherwise have been released, who were held for months without access to court or attorneys, see Brandon Garrett & Tania Tetlow, Criminal Justice Collapse: The Constitution After Hurricane Katrina, 56 Duke L.J. 127 (2006).

38. 42 U.S.C.A. § 5122(1).

39. Id. § 5191(b).

40. Id. §§ 5170 & 5191(a).

41. Id. § 5170b(a)(1)–(2).

42. Id. § 5170b(a)(3)(E).

43. Id. § 5170(c).

44. Id. §§ 9601–9675.


46. 42 U.S.C.A. § 9601(33).

47. Id. § 9601(23) & (24) & § 9604(a)(1).

48. Id. § 9606(a).

49. See supra note 45.

50. See Doyle, supra note 20.

51. See, e.g., 16 U.S.C.A. § 78 (authorizing the use of Army troops to protect Sequoia and Yosemite National Parks at the request of the Secretary of the Interior); 43 U.S.C.A. § 1065 (permitting the president to use military force to remove unlawful enclosures on public lands).

52. 42 U.S.C.A. § 98.


54. 10 U.S.C.A. § 302(a)–(b).
55. Id. § 382(c).
56. Id. § 382(d)(2).
59. See supra text accompanying notes 27–37.
60. U.S. Const. art I. § 8, cl. 15.
61. U.S. Const. art IV, § 4. Article IV, § 4 also requires the United States to protect each state against invasion and, if requested by the state legislature or governor, domestic violence. The latter clause is the Protection Clause.
63. U.S. Const. art I, § 8, cl. 3.
65. Lopez, 514 U.S. at 559.
69. For an example of this new scrutiny, see, e.g., United States v. Morrison, 529 U.S. 598 (2000). See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3.5 (3d ed. 2006).
70. 545 U.S. 1 (2005).
72. Raich, 545 U.S. at 29–32.
73. Id. at 66 (Thomas, J., dissenting).
74. U.S. Const. art. I, § 8, cl. 18.
75. 545 U.S. at 24.
76. Id. at 42 (Scalia, J., concurring in the judgment).
77. U.S. Const. art. I, § 8, cl. 1.
79. Id. at 207–08.
80. See supra text accompanying note 6; see supra note 28. See also George Cahlink, Governors “Disappointed” with Expanding Federal Role of National Guard, CONG. Q. TODAY, Oct. 6, 2006; Governors Association Opposes Senate Authorization Measure, INSIDE THE ARMY, Sept. 4, 2006.
81. Dole, 483 U.S. at 205.
82. Id. at 210.
83. Id. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).
85. Pub. L. No. 104-321, § 1, art. IX.